

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 16524 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Van Buel CARDWELL, JR.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2106

Van Buel CARDWELL, JR.

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 9 November 1976, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri suspended Appellant's license and other seaman's documents for two months subject to six months probation upon finding him guilty of inattention to duty. The specification found proved alleges that while serving as Operator and Person-in-Charge on board the M/V THOMAS C.L. NUGENT under authority of the license above captioned, on or about 27 August 1976, Appellant wrongfully permitted the discharge of oily bilge slops from that vessel in the navigable waters of the United States, to wit, the Ohio River near Mile 572.0, causing a sheen upon the water's surface, a violation of the Federal Water Pollution Control Act, Public Law 92-500 (86 Stat. 816).

At the hearing, Appellant was represented by professional counsel and entered a plea of guilty to the charge and specification.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specifications had been proved by plea. He then served a written order on Appellant suspending all documents issued to Appellant for a period of two months subject to six months' probation.

The entire decision and order was served on 23 November 1976. Appeal was timely filed on 7 December 1976.

FINDING OF FACT

On 27 August 1976, Appellant was serving as operator and person-in-charge on board the M/V THOMAS C.L. NUGENT and acting under authority of his license and did permit the discharge of oily bilge slops from the vessel into the Ohio River near Mile 572.0.

At the hearing Appellant pled guilty to the charge and

specification, but filed two motions to dismiss upon the grounds of lack of jurisdiction. The Administrative Law Judge denied the motions and found Appellant guilty as charged.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Administrative Law Judge erred in failing to dismiss the charges against Appellant for lack of jurisdiction.

Two grounds are set forth by Appellant for reversing the Decision and Order of the Administrative Law Judge. First, it is contended that the Coast Guard does not have jurisdiction over the allegations contained in the charge and specifications. Secondly, that revocation and/or suspension proceedings are inappropriate punishment for such charges.

APPEARANCE: Gover C. Potts, Jr. Esq., Wyatt, Crafton and Sloss,
 Louisville, Kentucky.

OPINION

I

Appellant's assertion that the Coast Guard lacks jurisdiction over the offense charged is based on the decision in Soriano v. United States of America, et al, 494 F.2d 681 (9th Cir. 1974). In that case the Court held that the Coast Guard had no jurisdiction to suspend Soriano's federal license for his alleged negligent since he was not "acting under the authority of his license".

46 U.S.C. 405 requires every tugboat, towing vessel and freight boat, when underway, to be navigated by officers "licensed in conformity with the provisions of sections 214, 224, 226, 228, 229, and 230 of this title and shall be subject to the same provision of law as officers navigating passengers steamers." Official notice is taken that the THOMAS C.L. NUGENT, Official No. 273047, is listed in Merchant Vessels of the United States, CG-408, as an oil-screw towing vessel of 129 gross tons. As a towing vessel the THOMAS C.L. NUGENT was required to be navigated by a licensed officer pursuant to 46 U.S.C 405. Appellant, by pleading guilty to the charge and specification admitted that he was serving as operator and person-in-charge of the vessel under the authority of his license. Thus, the holding in Soriano has no application here. Pursuant to 46 U.S.C. 239(b) the Coast Guard is authorized to investigate "all cases of acts of incompetency or misconduct committed by any licensed officer or holder of a certificate of service." 46 U.S.C. 239 (g) provides that should such licensed

officer or holder of a certificate of service be found "incompetent or has been guilty of misbehavior, negligence, or unskillfulness..." his license or certificate of service may be suspended or revoked. As provided at 46 C.F.R. 5.05-20 (a) (2):

"Negligence" and "inattention to duty" are essentially the same cover both the aspects of misfeasance and non-feasance. They are therefore defined as the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform.

Coast Guard jurisdiction to suspend Appellant's license is clearly authorized by 46 U.S.C. 239(g). See Commandant's Appeal Decision 2022(PALMER).

II

Appellant alleges that suspension of his license is inappropriate and illegal as the monetary penalty provided by the Federal Water Pollution Control Act for any "owner or operator" is the exclusive punishment approved by Congress for an offense involving the discharge of oil into the navigable waters of the United States.

Section 311(b) (6) of the Federal Water Pollution Control Act, 33 U.S.C. 1321 (b) (6) provides an assessment of a civil penalty of not more than \$5000.00 against the owner or operator of any vessel from which oil is discharged in harmful quantities into or upon the navigable waters of the United States or the waters of the contiguous zone. Sections 311(a) (6) of the Act, 33 U.S.C. 1321 (a) (6) defines "owner or operator" of a vessel as "any person owning , operating, or chartering by demise, such vessel." The term "operator" under the Act implies one in the class of an owner or character by demise. The term "person in charge of a vessel", referred to in section 311(b) (5), 33 U.S.C. 1321 (b) (5), however, is synonymous with the term captain or master of the vessel. This section provides that the person in charge of a vessel, as soon as he has knowledge of any discharge of oil from the vessel into or upon the navigable waters of the United States, is to immediately notify the appropriate U.S. agency. A failure to immediately notify such agency subjects the person to criminal liability. Appellant, as "operator and person in charge" of the M/V THOMAS C.L. NUGENT stands in the shoes of the captain or master and would not be subject to the penalty provided under section 311 (b) (6) of the Act although he would be obliged to follow the notification provision of the Act at section 311 (b) (5). There is nothing in

the record of this case which suggests that Appellant is subject to any penalty under the Act.

However, the penalties provided under section 311 of the Federal Water Pollution Control Act are not exclusive for offenses involving the discharging of oil into the waters of the United States and the contiguous zone. The Oil Pollution Act, 1961, as amended, 33 U.S.C 1001 et seq. and the Refuse Act, as amended, 33 U.S.C 407 clearly apply to the discharge of oil into these waters and operate concurrently with the Federal Water Pollution Control Act. (See especially 33 U.S.C. 1006 re. suspension or revocation of licenses and U.S. v. U.S. Steel Corp., D.C. Ill. 1972, 356 F.Supp.556).

Appellant's argument that the penalties imposed under the Federal Water Pollution Act are the exclusive punishment provided by Congress is unfounded and unsupported. It is well established that certain acts can form the basis of proceedings of a criminal, of a civil, and of an administrative nature, the decision in one case being independent of the decisions in the other tribunals. Proceedings under 46 U.S.C. 239 are instituted to determine whether or not a license, certificate, or document which was granted to the holder entitling him to certain privileges should remain in effect or be suspended, revoked or otherwise affected. Such proceedings are directed solely against Appellant's seaman's documents and impose no "money penalty" or imprisonment as could proceedings under the Federal Water Pollution Control Act. Commandant's Decisions on Appeal Nos. 345 (RAY), 507 (MILLER), 1787 (BEARD). A proceeding under RS 4450 (46 USC 239) is proper in "all cases of acts of incompetency or misconduct committed by any licensed officer or holder of a certificate of service while acting under the authority of his license or certificate of service." The master or person in charge of a vessel is charged with a duty to assure compliance with the law. Congress has mandated that it is the national goal to eliminate the discharge of pollutants into the navigable waters of the United States. By permitting the discharge of oil from vessel in violation of the Federal Water Pollution Control Act, Appellant failed to perform his duty and a proceeding under a 46 USC 239 is proper. See Commandant's Appeal Decision 1978 (DAVIS).

CONCLUSION

Having reviewed the entire record and having considered Appellant's arguments, I find that the Administrative Law Judge properly ruled on the question of jurisdiction and properly concluded that the charge and specification had been proved by plea.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri on 9 November 1976, is AFFIRMED.

E.L. PERRY
VICE ADMIRAL, U.S. COAST GUARD
ACTING COMMANDANT

Signed at Washington, D. C., this 27th day of June, 1977.

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UNITED STATES OF AMERICA
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ADDENDUM TO DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2106

Van Buel CARDWELL, JR.

Opinion I of the decision dated 27 June 1977, cited 46 U.S.C. 405 as requiring the M/V THOMAS C.L. NUGENT to be navigated by a licensed operator, but inadvertently quoted from the subsection (a) in lieu of subsection (b). 46 U.S.C. 405 (a) requires that inspected towing vessels be navigated by licensed "officers" while 46 U.S.C. 405 (b) provides that uninspected towing vessels shall be under the actual directions and control of a licensed "person." As the THOMAS C.L. NUGENT was an uninspected towing vessel 46 U.S.C. 405 (B) was applicable. The Appellant as operator of the vessel was required to be licensed, but was not required to be a licensed "officer." The appeal decision is amended by deleting the first and third sentences of paragraph two of Opinion I and substituting therefore, respectively, the following:

46 U.S.C 405 (b) requires every uninspected towing vessel, when underway, to be "under the actual direction and control of a person licensed by the Secretary to operate in the particular geographic area and by type of vessel under regulations prescribed by him."....

As an uninspected towing vessel the THOMAS C.L. NUGENT was required to be navigated by a person licensed pursuant to 46 U.S.C. 405(b).

As amended, the decision of 27 June 1977 is AFFIRMED.

O.W. SILVER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 12th day of September 1977.